In the Supreme Court of the United States

OCTOBER TERM, 1974

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 74-221

THEODORE R. GOOCH, et al.,
Petitioners,

vs.

SKELLY OIL COMPANY, a corporation, et al.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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TABLE OF CONTENTS

Opinions Below 1

Questions Presented 2

Statutes Involved 2

Statement of the Case 3

Argument—

I. Respondents Properly Moved to Dismiss the Appeals, and Were Not Required to File a Separate Notice of Appeal from the Order Extending the Time for Appeal, As Permitted by All Courts Passing on the Question 6

II. The Court of Appeals Was Correct in Holding That the Undisputed Record Failed to Establish "Excusable Neglect" 9

Conclusion 11

Table of Authorities

CASES

Buckley v. *United States*, (C.C.A., 10th, 1967), 382 F.2d 611, cert. den. 390 U.S. 997, 88 S.Ct. 1202, 20 L.Ed.2d 97 (1968) 7

City of Gainesville v. *Brown-Crummer Investment Co.*, 72 L.Ed. 54 7

Harris Truck Lines, Inc. v. *Cherry Meat Packers, Inc.*, 371 U.S. 215, 9 L.Ed.2d 261 10

In the Matter Pertaining to W. H. "Pat" O'Bryan, (C.C.A., 10th, 1968), 399 F.2d 916, cert. den. 89 S.Ct. 1014, 394 U.S. 906, 22 L.Ed.2d 217, rehrg. den. 89 S.Ct. 1456, 394 U.S. 994, 22 L.Ed.2d 772 7

Levisa Stone Corp. v. *Elkhorn Stone Co.*, (C.C.A., 6th, 1969), 411 F.2d 1208, cert. den. 90 S.Ct. 913, 397 U.S. 925, 25 L.Ed.2d 104 7

Resnick v. *Lehigh Valley R. Co.*, (S.D.N.Y. 1951), 11 F.R.D. 76 8

TEXTS AND STATUTES

29 Am. Jur.2d, Evidence, § 194, p. 247 10

Annotation, 9 L.Ed.2d 1088, at 1093 10

9 Moore's Federal Practice, Secs. 204.13(4), 204.02, 204.01 ..... 7, 8

Rule 4(a), Federal Rules of Appellate Procedure 6, 8, 10

28 USC § 2107 (63 Stat. 104) 2

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OPINIONS BELOW

The opinion of the Court of Appeals is reported in 493 F.2d 366. The Journal Entry of Judgment reversed by that decision is reproduced on pages 88-89 of the printed Appendix filed in the Court of Appeals. (Document No. 7 of the partial transcript of record). Petitioners have reproduced the district court opinion and judgment on the merits in Appendix B to their Petition.

QUESTIONS PRESENTED

1. May the propriety of an appeal, taken under an order of the district court extending the time to file a notice of appeal an additional 30 days based on alleged "excusable neglect", be attacked by a motion to dismiss the appeal?

2. Was the record insufficient to establish "excusable neglect" in filing a timely appeal, when the clerk of the district court mailed copies of the final order to the offices of all counsel of record, when petitioners' general attorneys received it promptly, and when petitioners' trial attorney, who alleged he did not receive it, officed in Wichita, Kansas, wherein the district court was located?

STATUTES INVOLVED

Petitioners have not cited 28 USC § 2107 (63 Stat. 104), which reads as follows:

> "Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.
>
> In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.
>
> In any action, suit or proceeding in admiralty, the notice of appeal shall be filed within ninety days

after the entry of the order, judgment or decree appealed from, if it is a final decision, and within fifteen days after its entry if it is an interlocutory decree.

The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

This section shall not apply to bankruptcy matters or other proceedings under Title 11."

STATEMENT OF THE CASE

Petitioners are substantial landowners from whose lands have been produced oil and gas in prolific quantities for many years, from multiple geological formations. (Petition, pp. A2-A12). When respondents sought to prevent declining oil production by means of a unitized secondary recovery project, petitioners demanded large cash payments and additional royalties above those provided in their leases, as a condition to their approval and consent to unitization, such consent being required by local law. (Petition, pp. A12-A17). Respondents declined, and petitioners then filed these suits seeking cancellation of the leases and damages for alleged failure to further develop and for alleged drainage.

After extensive discovery and trial, the district court found, upon substantial, if not undisputed, evidence, that petitioners failed in their burden of proof, that defendants had not failed to prudently develop; that no drainage occurred, and hence there existed no right of cancellation or damages. (Petition, p. A22).

Petitioners timely moved to alter the judgment on October 5, 1972. On October 25, 1972, the district court overruled the motion. (C.A. App. 82).[1] On the same date, the Clerk sent a copy of the order to all counsel of record, including petitioners' Wichita, Kansas, counsel, and to petitioners' Hugoton, Kansas, counsel. (Petitioners resided in or near Hugoton, Kansas, and their Hugoton counsel were their general attorneys.) (C.A. App. 89).

On December 12, 1972, 48 days later, petitioners filed a motion to extend the time for appeal an additional 30 days under FRAP 4(a), based on alleged "excusable neglect". The sole factual basis alleged as a basis for extending the time was that, although petitioners' Hugoton, Kansas, counsel promptly received the order overruling the motion to alter the judgment, their Wichita, Kansas, counsel had not received a copy of the final order.[2] (C.A. App. 83-85).

Nothing in the record negates the presumption that petitioners themselves received prompt notice of the final order, because of the admitted mailing to their counsel. Nothing in the record supports petitioners' present immaterial assertions, and inferences that Wichita, Kansas, counsel was solely responsible, pursuant to prior agreement, after receiving notice of the final order, to file a timely notice of appeal.

The present suits, in fact, were filed in state court in Hugoton, Kansas. Defendants removed to federal court in Wichita, Kansas. At the trial of the cases, Hugoton counsel actively assisted petitioners' Wichita counsel during the trial.

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1. Printed Appendix in the Court of Appeals. (Document No. 7).

2. The affidavits filed do not negate that the order was received by lay employees of Wichita counsel.

On December 15, 1972, respondents' Wichita counsel, having been given telephone notice on December 12 or 13, of a "hearing", appeared in court on petitioners' motion for additional time based on excusable neglect. At the time of hearing, the only evidence of record was Mr. Cornwell's affidavit (petitioners' Wichita counsel) stating that he had not personally received notice of the final order, and that other lawyers in his firm had not received it (but not stating that the law firm staff had not received it). (C.A. App. 83-85). Petitioners' Wichita counsel stipulated that Hugoton, Kansas, counsel had timely received the notice; and made no assertion that petitioners themselves had not been timely notified. (C.A. App. 83-89).

Respondents' counsel filed an affidavit reciting he had not had sufficient time to investigate the facts. (C.A. App. 85).

The "hearing" before the trial court consisted of the district court announcing its decision before any argument, or any due consideration of respondents' lack of opportunity to investigate the facts. The district court promptly announced he would not even find the required "excusable neglect", merely that petitioners' Wichita counsel had not received notice of the final order, even though his co-counsel had received it, and that, therefore, he wanted petitioners to have the right to have his rulings on the merits reviewed on appeal. (Petition, pp. A36-A37).

ARGUMENT

I. Respondents Properly Moved to Dismiss the Appeals, and Were Not Required to File a Separate Notice of Appeal from the Order Extending the Time for Appeal, As Permitted by All Courts Passing on the Question.

As was typical in proceedings below, petitioners' assertions in this Court are inaccurate and incomplete. The Court below, in dismissing the appeals before it, had no alternative in applying the clear terms of Rule 4(a) of the Federal Rules of Appellate Procedure, as enunciated and approved by this Court, and other appellate courts.

Petitioners misstate the record in several material particulars:

(1) Petitioners state, p. 15, that the "Court of Appeals dismissed the appeal without a transcript of the rule 4(a) hearing." This statement is in error, for that transcript was attached to respondents' motion to dismiss the appeals, and was also included in the Record on Appeal. (See Index to Record on Appeal, Vol. 4; Document No. 1).

(2) Petitioners erroneously state, p. 15, that "The issue of excusable neglect was not even addressed in the printed briefs." In fact, respondents filed a printed brief devoted exclusively to this issue, and, after having been overruled with the right to renew when briefed on the merits, again renewed the motion to dismiss in their printed brief on the merits. (Documents 2-6, 8-9).

One thing that indisputably appears from the Record is simply this: The district court granted the motion for additional time based on its desire to allow an appeal to

be taken, regardless of the extent of the neglect to file it on time. The Court of Appeals, on the other hand, gave extensive and considered judgment to the actual record in determining that the neglect to file the Notice of Appeal on time was not "excusable neglect".

Petitioners' initial contention that respondents were required to file a notice of cross-appeal, or a separate appeal, from the order permitting the additional appeal time, is frivolous and devoid of merit. As noted by Professor Moore:

> "If the district court grants an extension of time for appeal, the order granting the extension may be challenged in the court of appeals by a motion to dismiss the appeal." (*9 Moore's Federal Practice*, Sec. 204.13(4)).

There is not a case holding to the contrary.[3]

The reason is simple. The filing of a timely notice of appeal has universally been considered to be jurisdictional. Any court must examine its own jurisdiction, even without suggestion from the parties. While Professor Moore recognizes this universal rule, *9 Moore's Federal*

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3. All cases considering the question have arisen on motions to dismiss, rather than on separate cross-appeals. E.g., *City of Gainesville* v. *Brown-Crummer Investment Co.*, 72 L.Ed. 54; *Levisa Stone Corp.* v. *Elkhorn Stone Co.*, (C.C.A., 6th, 1969), 411 F.2d 1208, cert. den. 90 S.Ct. 913, 397 U.S. 925, 25 L.Ed.2d 104; *In the Matter Pertaining to W. H. "Pat" O'Bryan*, (C.C.A., 10th, 1968), 399 F.2d 916, cert. den. 89 S.Ct. 1014, 394 U.S. 906, 22 L.Ed.2d 217, rehrg. den. 89 S.Ct. 1456, 394 U.S. 994, 22 L.Ed.2d 772; *Buckley* v. *United States*, (C.C.A., 10th, 1967), 382 F.2d 611, cert. den. 390 U.S. 997, 88 S.Ct. 1202, 20 L.Ed.2d 97 (1968).

Petitioners' unsupported contention could lead to a legal nightmare: "A" moves for additional time to appeal for excusable neglect; the court grants the motion; "B" moves for additional time to appeal from that order based on excusable neglect; the court grants the motion; "A" must appeal from it; *ad infinitum*.

Practice, § 204.02, p. 908[4], he elsewhere indicates that the present rules are not "jurisdictional", in the sense that Congress has placed limitations on the power of this Court to establish rules relating to the taking of appeals. *9 Moore's Federal Practice*, p. 910. But talking about jurisdictional power is a mere mincing of words. Whether by congressional statute, or by court rule authorized by congressional statute, the time limitations for filing appeals from district courts have universally been strictly enforced. As stated by Professor Moore himself:

> "The provisions of Rule 4, the successor to earlier rules fixing the time for appeal from district courts to courts of appeals, ought to be regarded as mandatory in the highest degree. The finality of judgments is a blessing that is worth a high price." (*9 Moore's Federal Practice*, Sec. 204.01, p. 910).

Not a single case has been cited by petitioners, and none exists, which is in conflict with the decision below. All cases which bear upon this point are consistent, as they are logical, in carrying out the meaning of Rule 4(a).[5]

No rational basis exists for requiring respondents to file separate notices of appeal from an order pertaining to the petitioners' right of appeal. For petitioners' appeals carry with themselves the infirmities inherent in them. Whether described as jurisdictional, or a matter of power of the court under a binding rule, the time limitations

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4. "So many hundreds of cases support the proposition that a Court of Appeals has no jurisdiction to hear an untimely appeal that it is too late to undermine the proposition by mere history and logic. * * *"

5. The early district court case, cited by petitioners, *Resnick v. Lehigh Valley R. Co.*, (S.D.N.Y. 1951), 11 F.R.D. 76 is factually dissimilar on its face.

and the conditions attached thereto, if not fulfilled, render those appeals invalid and ineffective. These considerations, we suggest, are among those leading all courts heretofore to acknowledge the logical, pragmatic procedure of challenging an untimely appeal by a motion to dismiss.

In addition to these considerations, we may also suggest there is no sound logic which suggests the contrary conclusion. Here, all of the record was available to the Court of Appeals. There was no rational reason why additional notices of appeal should clutter the record. When the motions to dismiss were filed in the court of appeals, all parties had the right, which they exercised, to bring up for review all pertinent portions of the Record.

II. The Court of Appeals Was Correct in Holding That the Undisputed Record Failed to Establish "Excusable Neglect".

The Court of Appeals' holding of ordinary neglect, not "excusable neglect" is required by the record. One of petitioners' counsel—indeed, their general counsel—had full and timely notice of the final adverse order. There is no fact of record to support petitioners' present immaterial assertions that their Wichita counsel had been authorized or instructed to appeal upon entry of a final order.

Petitioners' Hugoton, Kansas, counsel, who admittedly received prompt notice of the final adverse order, were not merely "local" counsel. They were the regular, general attorneys for their clients, who resided nearby. Nothing of record shows either that petitioners did not know of the final order, nor that they determined within 30 days after the order to take an appeal. Clearly, notice to counsel

is notice to his client. Annotation, 9 L.Ed.2d 1088, at 1093.

Moreover, the procedure adopted by petitioners in seeking additional time to appeal was calculated to prevent the disclosure of all facts pertinent to the issue of excusable neglect. Hugoton general counsel failed to appear at the district court hearing on December 15, 1972, as did the petitioners themselves. Petitioners did not make available their Wichita counsel's mail clerk who presumptively received the final adverse order on behalf of Wichita counsel for petitioners. (29 *Am. Jur.2d, Evidence,* § 194, p. 247). After actively assisting in the trial on the merits, petitioners' Hugoton counsel suddenly disappeared from the scene in all proceedings, wherein the jurisdictional question was involved.

Upon this record, we suggest the Court of Appeals had no alternative but to dismiss the appeals. Accepting petitioners' contentions upon the facts of record would only open the door to flagrant abuses of the purpose of Rule 4(a).[6]

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6. The present case differs from *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U.S. 215, 9 L.Ed.2d 261. In that decision, petitioners had filed their motion to extend the time for appeal within the initial 30 day period, and justifiably relied on the district court order extending the time. Otherwise, petitioners could have filed a notice of appeal within the initial 30 days.

CONCLUSION

Petitioners fail to present any sound reason for reviewing the judgment below. Their contentions are unsound, and are, moreover factually unsupported by the record here presented.

Respectfully submitted,

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